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SUPREME COURT
STATE OF WASHINGTON

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NO. 83038-0

SUPREME COURT OF THE STATE OF WASHINGTON

JERRY D. SMITH, as Personal Representative of the
ESTATE OF BRENDA L. SMITH, Deceased, and on behalf of
JERRY D. SMITH, RICHONA HILL, JEREMIAH HILL, and the
ESTATE OF BRENDA L. SMITH,

Petitioners,

v.

ORTHOPEDICS INTERNATIONAL LIMITED, P.S.; and
PAUL SCHWAEGLER, M.D.,

Respondents.

RESPONDENTS' ANSWER TO AMICUS CURIAE MEMORANDUM
OF WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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I. ARGUMENT

A. There Was No Ex Parte Contact Violative of *Loudon* In This Case.

Defense counsel did not engage in any ex parte interviews of plaintiff's treating physicians. Defense counsel did not do anything ex parte that was designed to or that did seek, solicit, or obtain any information from Dr. Johansen about his patient. Thus, the Court of Appeals correctly determined that there was no violation of the *Loudon*¹ prohibition against defense counsel conducting ex parte interviews of a plaintiff's treating physician.

All that occurred here was that a lawyer who happened to represent a defendant provided public information about an open public trial to the lawyer for a scheduled witness who happened also to be a nonparty treating physician. The physician had been deposed by plaintiff's counsel, who learned from that deposition that the physician's testimony would not help plaintiff's case. The physician's trial testimony was consistent with his deposition testimony. Plaintiff's counsel declined to re-cross-examine the physician about his receipt of information about the trial. There was no contamination of discovery or the presentation of evidence at trial, and no prejudice to plaintiff's case. Nothing in *Loudon*, or any of its progeny, prohibits lawyers for defendants from communicating with lawyers for

¹ *Loudon v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988).

scheduled witnesses about what is transpiring, or the theories that are being advanced, in an open public trial, simply because the scheduled witness is a plaintiff's treating physician, any more than *Loudon*, or any of its progeny, precludes lawyers for multiple treating physician defendants from discussing such things or trial strategies amongst themselves.

The Supreme Court did not adopt the *Loudon* rule because it considered ex parte interviews between defense lawyers and treating physicians evil or unethical. Indeed, the Court acknowledged that ex parte interviews are not unethical. *Loudon*, 110 Wn.2d 675, 681 n.4, 756 P.2d 138 (1988) (quoting WSBA Formal Ethics Op. 180 (1985)).

The Court enacted the *Loudon* rule, as a matter of public policy, so that a doctor does not get put in the position of having to try to figure out, on his or her own and in an informal setting, what medical information about a patient is relevant to the patient's pending lawsuit against someone else. *Loudon*, 110 Wn.2d at 677-79. Defense counsel's communications with the lawyer for treating physician Dr. Kaj Johansen in this case was not designed to elicit, nor did it elicit, the disclosure of irrelevant, privileged medical information that the *Loudon* prohibition against ex parte interviews of treating physicians was designed to prevent. The WSAJ Foundation's misplaced attempt to suggest otherwise is not borne

out even by its own discussion, *WSAJF Amicus Memo. at 4-7*, of the background of the *Loudon* rule.

B. The Court of Appeals Decision Does Raise Any Issues of Substantial Public Interest that Should Be Determined by This Court.

The Supreme Court ordinarily declines to consider arguments raised only by amici, *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003); *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1*, 140 Wn.2d 403, 413-14, 997 P.2d 915 (2000), and should decline to consider the new arguments the WSAJ Foundation raises, *WSAJF Amicus Memo. at 8-10*, in support of the petition for review. If the Supreme Court does consider the arguments, it should reject them as reasons for accepting review.

To the extent *Loudon* adopted any “bright line rule,” *WSAJF Amicus Memo. at 8-9*, it did so (a) for “contact” that a defendant’s lawyer has with a treating physician (b) that seeks, or creates a risk of inadvertent disclosure, to the defense lawyer, (c) of still-privileged health care information. The one-way “contact” here was between lawyers, and it neither sought nor created any risk of inadvertent disclosure of still-privileged health care information to the defendant’s lawyer. Contrary to the WSAJ Foundation’s assertions, *WSAJF Amicus Memo. at 9*, *Loudon* does not stand for the proposition that a treating physician or his lawyer

cannot be provided or seek public information about a case from the lawyer for a defendant treating physician, just because that treating physician is a defendant. Nor does *Loudon* stand for the proposition that the lawyer for a treating physician can only receive or obtain information about the case from or in the presence of plaintiff's counsel.

The Court of Appeals correctly concluded that “[w]ithout more, the transmittal of public documents to a fact witness who is also a treating physician does not fall within the ambit of *Loudon*,” *Smith v. Orthopedics Int’l, Ltd.*, 149 Wn. App. 337, 342, 203 P.3d 1066 (2009), and that “[a]sking Dr. Johansen’s attorney to have him review the plaintiff’s trial brief and the expert’s testimony is not comparable to a *Loudon* violation,” *id.* at 343. Because there was no “violation” of what *Loudon* was concerned about or prohibited, there is no reason to consider whether Mr. Smith should have been granted some kind of relief from the adverse verdict despite his inability to show any prejudice.

Nor is it necessary or appropriate for this Court to take review to “comment on the interface between the *Loudon* rule and RCW 5.60.060(4),” *WSAJF Amicus Memo. at 10*, inasmuch as Mr. Smith has not previously raised an issue involving that statute and the Court of Appeals decision neither addresses nor offers any “comment on” the statute or its “interface” with *Loudon*.

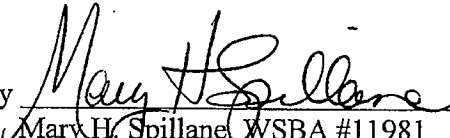
Finally, the WSAJ Foundation baldly asserts, *WSAJF Amicus Memo.* at 8, that the Court of Appeals opinion will somehow have “profound effect on the discovery process in personal injury litigation, and perhaps the physician-patient relationship itself,” or “a destabilizing effect on pretrial discovery of treating physicians’ information and opinions in personal injury actions. The WSAJ Foundation offers no explanation as why or how such would inexorably follow from the Court of Appeals’ straightforward opinion in *Smith*. Nothing about defense counsel’s provision of plaintiff’s trial brief and plaintiff’s expert’s trial testimony to Dr. Johansen’s lawyer or from Dr. Johansen’s lawyer to Dr. Johansen had any effect on the discovery process or pretrial discovery of Dr. Johansen’s information and opinions. His deposition testimony (and his trial testimony that was wholly consistent with his deposition testimony) may not have been to plaintiff’s counsel’s liking, but it was not in any way affected by the communication defense counsel had with his counsel.

II. CONCLUSION

For the foregoing reasons and for the reasons set forth in Respondents’ “Answer to Petition for Review, this Court should deny the Petition for Review. The Court of Appeals decision is not in conflict with *Loudon*, or any of its progeny, nor does the petition present any issue of substantial public interest that should be determined by this Court.

RESPECTFULLY SUBMITTED this 3rd day of August, 2009.

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CERTIFICATE OF SERVICE
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I hereby certify under penalty of perjury under the laws of
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Washington that on the August, 3, 2009, I caused a true and correct copy
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Attached for filing in .pdf format is Respondents' Answer to Amicus Curiae Memorandum of Washington State Association for Justice Foundation in *Smith v. Orthopedics Int'l, Ltd., et al.*, Cause No. 83038-0. The person filing this answer is Mary H. Spillane, WSBA No. 11981, e-mail address: mspillane@williamskastner.com.

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